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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDDIE J. BOOKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional, statutory and guidelines provisions involved	1
Statement	2
1. The underlying facts	2
2. The district court proceedings	2
3. The courts of appeals' decision	3
Reasons for granting the petition	7
A. *Blakely* has unsettled understandings about the inapplicability of *Apprendi* to the Sentencing Guidelines	9
B. The courts of appeals are in conflict over the applicability of *Blakely* to federal guidelines sentencing	11
C. The lower Federal courts are acutely in need of guidance on the proper sentencing procedures if *Blakely* is found applicable to the Sentencing Guidelines	14
D. The questions presented are of enormous importance	19
E. The Court should resolve the questions presented in this case	22
F. Expedited review is warranted	27
Conclusion	28
Appendix A	1a
Appendix B	26a
Appendix C	28a
Appendix D	31a
Appendix E	33a

TABLE OF AUTHORITIES

Cases:	Page
Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987)	15
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	4, 7, 9
Blakely v. *Washington*, 124 S. Ct. 2531 (2004)	3, 5 7, 8, 9, 10, 16, 21, 25
Buckley v. *Valeo*, 424 U.S. 1 (1976)	15
Carlson v. *Green*, 446 U.S. 14 (1980)	23
Champlin Ref. Co. v. *Corporation Comm'n*, 286 U.S. 210 (1932)	15
Edwards v. *United States*, 523 U.S. 511 (1998)	5, 7
Iran Nat'l Airlines Corp. v. *Marschalk Co.* 453 U.S. 919 (1981)	27
Kolstad v. *American Dental Ass'n*, 527 U.S. 526 (1999)	23
Koon v. *United States*, 518 U.S. 81 (1996)	16
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)	15
Mistretta v. *United States*, 488 U.S. 361 (1989)	8, 23
Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	23
Ring v. *Arizona*, 536 U.S. 584 (2002)	9
United States v. *Banks*, 340 F.3d 683 (8th Cir. 2003)	10
United States v. *Caba*, 241 F.3d 98 (1st Cir. 2001)	10
United States v. *Cannady*, 283 F.3d 641 (4th Cir.), cert. denied, 537 U.S. 936 (2002)	10
United States v. *Casas*, 356 F.3d 104 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004)	10
United States v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004)	13
United States v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004)	12, 17

Cases—Continued:	Page
United States v. *Einstman*, 2004 WL 157622 (S.D.N.Y. July 14, 2004)	17, 18
United States v. *Fanfan*, No. 03-47-P-H (D. Me June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004)	12, 18, 24
United States v. *Floyd*, 343 F.3d 363 (5th Cir. 2003), cert. denied, 124 S. Ct. 219 (2004)	10
United States v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004)	14
United States v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004)	17
United States v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004)	13
United States v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004)	12, 18
United States v. *Luciano*, 311 F.3d 146 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004)	10
United States v. *Mendez-Zamora.*, 296 F.3d 1013 (10th Cir.), cert. denied, 537 U.S. 1063 (2002)	10
United States v. *Merritt*, 361 F.3d 1005 (7th Cir. 2004)	10
United States v. *Mistretta*, 486 U.S. 1054 (1988)	24
United States v. *Montgomery*: 2004 WL 1562904 (6th Cir. July 14, 2004)	14
2004 WL 1535646 (D. Utah July 8, 2004)	12
United States v. *Ochoa*, 311 F.3d 1133 (9th Cir. 2002)	10
United States v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004)	13
United States v. *Ortiz*, 318 F.3d 1030 (11th Cir. 2003)	10
United States v. *Parmelee*, 319 F.3d 583 (3d Cir. 2003)	10

Cases—Continued: Page

United States v. *Penaranda*:
2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004) 13, 14, 15, 19, 22, 25, 26
No. 03-1284 (filed Sept. 18, 2003) 26
United States v. *Pettigrew*, 346 F.3d 1139 (D.C. Cir. 2003) 10
United States v. *Pineiro*, 2004 WL 1543170 (5th Cir. July 12, 2004) 12, 13, 21
United States v. *Shamblin*, 2004 WL 146561 (S.D. W. Va. June 30, 2004) 12, 17, 18
United States v. *Tarwater*, 308 F.3d 494 (6th Cir. 2002) 10
United States v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004) 12, 18
United States v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004) 12, 18
United States v. *Watts*, 519 U.S. 148 (1997) 5
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 23

Constitution, statutes and regulations:

U.S. Const. Amend. VI 4, 5, 6, 7, 10, 14, 22
18 U.S.C. 3553(a)(2)(A) 16
18 U.S.C. 3553(a)(2)(B) 16
18 U.S.C. 3553(a)(2)(C) 16
21 U.S.C. 841(a) 2
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b) 7
21 U.S.C. 841(b)(1)(A)(iii) 2
28 U.S.C. 994(a)(1) 16
28 U.S.C. 994(b)(1) 10
28 U.S.C. 1254(2) 14, 25
28 U.S.C. 2106 23

Regulations—Continued: Page

United States Sentencing Guidelines:
§ 1B1.3 ..... 3, 20, 22
§ 2B1.1 18
§ 2D1.1(c)(2) 3
§ 2D1.1(c)(4) 3
§ 3C1.1 3
§ 5G1.1(a) 10
§ 6A1.3(b) 16

Miscellaneous:

http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225 4
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 16
Robert L. Stern, et al., *Supreme Court Practice* (8th ed. 2002) 27
United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics* 19, 20
U.S. Senate Committee on the Judiciary, Washington v. Blakely *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm., 106th Cong., 2d Sess.* (2004) <http://judiciary.senate.gov/print_testimony.cfm.id=1260&wit=id_3669> 21
Blakely *Inapplicable to the Guidelines Audio*: <http: www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225> .. 4

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is not yet reported in the *Federal Reporter*, but is *available in* 2004 WL 1535858.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 31a-64a.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, respondent was convicted of possessing at least 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a) and 841(b)(1)(A)(iii), and distributing cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. A divided court of appeals reversed and remanded for resentencing. App., *infra*, 1a-27a.

1. The underlying facts

On February 26, 2003, respondent sold a quantity of crack cocaine to a customer at the residence of a third party. Before the customer could leave, police officers responding to a criminal trespass complaint arrived and knocked on the door. The officers observed that the customer attempted to swallow what turned out to be crack cocaine. Respondent was apprehended outside the house and detained. Ultimately, the officers found a duffle bag that respondent admitted was his. The bag contained approximately $400, drug paraphernalia, and 92.5 grams of crack cocaine. Respondent gave a written statement to the police in which he admitted selling an additional 20 ounces (566 grams) of crack cocaine. Gov't C.A. Br. 7-10, 11-12; Presentence Report (PSR) 3-4.

2. The district court proceedings

On March 12, 2003, respondent was charged in a two-count indictment in the Western District of Wisconsin with possessing more than 50 grams of cocaine base with intent to distribute it and with distributing cocaine base, both in violation of 21 U.S.C. 841(a)(1). The jury found respondent guilty on both counts. The Presentence Report initially recommended that respondent be held responsible for possession of the 92.5 grams of crack cocaine that was found

in his duffle bag. PSR 6. That would have resulted in an offense level of 32 under the United States Sentencing Guidelines. See Sentencing Guidelines § 2D1.1(c)(4). In an addendum, the PSR adopted the government's position that respondent's relevant conduct under the Guidelines, see Sentencing Guidelines § 1B1.3, should also include the 20 additional ounces of crack cocaine that respondent had admitted selling. Gov't C.A. Br. 11-12.

At sentencing, the court held respondent responsible for the 20 additional ounces of crack cocaine. Sent. Tr. 7-8. That resulted in a total of 658.5 grams of crack cocaine, and an offense level of 36 under Sentencing Guidelines § 2D1.1(c)(2). See Sent. Tr. 7. The court added two additional levels for obstruction of justice under Sentencing Guidelines § 3C1.1, based on the court's finding that respondent had perjured himself at trial when he "knowingly denied any of the elements of the offense," in contradiction of the written statement he had made to the police on the day of his arrest. Sent. Tr. 9-10. Based on his extensive prior record, which included 23 prior convictions, respondent was placed in criminal history category VI. *Id.* at 9; PSR 6-16. His sentencing range was 360 months to life imprisonment. The court imposed a sentence of 360 months of imprisonment. Sent. Tr. 11.

3. The court of appeals' decision

a. On appeal, respondent initially argued that he was entitled to a new trial because the district court had erroneously limited his cross-examination of a government witness and that he was entitled to a new sentencing hearing because his sentence was based on his purportedly unreliable written statement made to police officers on the day of his arrest. Resp. C.A. Br. 13-27.

On June 24, 2004, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531. Six days later, on respondent's motion for supplemental briefing, the court of appeals

ordered both parties to file briefs by July 2 addressing the applicability of *Blakely* to this case. Respondent argued that the the Sixth Amendment entitled him to be sentenced within the Guidelines range for defendants responsible for 92.5 grams of crack cocaine (rather than the 658.5 grams found by the judge) and that he was entitled to be sentenced without the two-level enhancement for obstruction of justice. The government argued that *Blakely* is inapplicable to the Guidelines. The court heard oral argument on July 6.[1]

b. On July 9, 2004, a divided panel of the court of appeals affirmed respondent's conviction, reversed his sentence, and remanded for further proceedings. The court "expedited [its] decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of" *Blakely*—which, the court stated, had "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a.

The court began by reciting this Court's holding in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." App., *infra*, 3a. The court continued that in *Blakely*, this Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts*

[1] At oral argument, the government urged that, if a court finds that sentencing under the Guidelines must comport with *Blakely* and that there are enhancements under the Guidelines that are not established by the jury verdict or admitted by the defendant, the Guidelines as a whole cannot be applied and the court should impose a sentence, as a matter of its discretion, within the minimum and maximum statutory terms, giving due regard to Guidelines. An audio recording of the argument is available at <http://www.ca7.uscourts.gov/farg/arg.fwx?caseno=03-4225>. The government's unofficial transcript of the relevant excerpts of the argument, made from the recording, is reproduced at App., *infra*, 28a-30a.

reflected in the jury verdict or admitted by the defendant." *Ibid.* (quoting *Blakely*, 124 S. Ct. at 2537). Under those holdings, the court concluded, "[t]he maximum sentence that the district judge could have imposed in this case (without an upward departure), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given [respondent's] base offense level of 32 * * * and the defendant's criminal history" under the Guidelines. App., *infra*, 3a-4a. The court thus determined that, absent the defendant's consent, *Blakely* precluded the judge from making additional factual findings that would increase respondent's Guidelines sentence. *Id.* at 9a.

The court rejected a distinction between the federal guidelines at issue here and the state statutory guidelines at issue in *Blakely* based on "the fact that the [federal] guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature." App., *infra*, 4a. "The Commission is exercising power delegated to it by Congress," the court reasoned, "and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." *Ibid.* The court also rejected the contention that this Court's prior decisions in *Edwards* v. *United States*, 523 U.S. 511 (1998), and *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), established the constitutionality of judicial factfinding that supports sentence enhancements under the Guidelines. App., *infra*, 9a-11a.

The court concluded that "the guidelines, though only in cases such as the present one in which they limit defendants' right to a jury and to the reasonable-doubt standard * * * violate the Sixth Amendment as interpreted by *Blakely*." App., *infra*, 8a-9a. Accordingly, the court held, respondent "has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice." *Id.* at 11a.

The court then remanded the case to the district court for resentencing. It noted that, if the government sought a higher Guidelines sentence than 262 months of imprisonment, the district court would have to determine whether the "the aspect of the guidelines that [the court] believe[s] to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. If that were the case, then "the guidelines would be invalid in their entirety" and the district judge would be "free as he was before the guidelines were promulgated to fix any sentence within the statutory range." *Id.* at 13a. Stating that the severability issue had "not been briefed or argued," however, the court declined to address it. *Ibid.* The court also declined to resolve procedural issues that might surround any effort to conduct a jury trial on the enhancement factors if the Guidelines were found to be severable. *Id.* at 12a.

The court of appeals thus held that "[t]he application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*." App., *infra*, 13a. But the court noted that it could not be "certain" that its holding was correct. *Id.* at 9a. "If our decision is wrong," the court concluded, "may the Supreme Court speedily reverse it." *Ibid.*[2]

c. Judge Easterbrook dissented. He disagreed with the majority "on both procedural and substantive grounds." App., *infra*, 14a. As a matter of procedure, he concluded that the court of appeals had no authority to hold the

[2] In an amendment to its order filed on July 13, 2004, the court added that "[b]ecause the government does not argue that [respondent's] Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error." App., *infra*, 26a-27a.

Guidelines unconstitutional because any such holding would be inconsistent with this Court's cases, including *Edwards*, *supra*, which "held that a judge * * * may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum." *Id.* at 15a.

Substantively, Judge Easterbrook noted that this Court had repeatedly described the *Apprendi* rule as triggering Sixth Amendment protections for facts that increase the "*statutory* maximum." See App., *infra*, 18a (emphasis added) (citing *Apprendi*, 530 U.S. at 490; *Blakely*, 124 S. Ct. at 2537). In this case, he noted, Congress established the statutory maximum penalties for drug offenses in 21 U.S.C. 841(b). App., *infra*, 18a. The Guidelines, he reasoned, do not reduce that statutory authorization, but instead affect sentencing only after the degree of the offense has been established by the jury. *Id.* at 22a.

Judge Easterbrook also noted that, "[g]iven the matrix-like nature of the [Sentencing Guidelines] system and the possibility of departure," App., *infra*, 23a, "[e]ven if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case." *Id.* at 24a. Judge Easterbrook did not believe that *Blakely* had taken that step. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise per-

mitted. *Id.* at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." App., *infra*, 2a. In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for fifteen years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The result has been a wave of instability in the federal sentencing system that has left the government, defendants, and the courts without clear guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month. The sheer volume of federal sentencings has resulted in virtually unprecedented uncertainty. The courts facing the problem have developed a range of mutually inconsistent approaches to federal sentencing. Those conflicting approaches could lead to the need for thousands—or even tens of thousands—of resentencing proceedings once the legal issues are settled. It could also lead to debilitating uncertainty about the proper length of federal sentences, which could cripple other aspects of the system, including plea bargaining practice. Ultimately, the uncertainty could hinder achievement of the crucial social goals at stake in the criminal justice system. The courts of appeals have already fallen into conflict over the implications of *Blakely* and one court of appeals has taken the extraordinary step of certifying questions to this Court in an effort to obtain authoritative guidance on the meaning of *Blakely* for federal sentencing. Further review is warranted on an expedited basis to help restore a stable footing to the federal system of criminal justice.

A. *Blakely* Has Unsettled Understandings About The Inapplicability Of *Apprendi* To The Sentencing Guidelines

In *Blakely*, the defendant was convicted in state court on his guilty plea to second-degree kidnapping, in which he admitted the use of a firearm. One Washington statute authorized a maximum term of ten years of imprisonment for the kidnapping offense. The state's statutory sentencing guidelines system, however, established a range of 49-53 months of imprisonment for his offense of second-degree kidnapping with a firearm, absent a judicial finding, by the preponderance of the evidence, of a "substantial and compelling reason[] justifying an exceptional sentence." 124 S. Ct. at 2535. The sentencing court found that Blakely's offense involved "deliberate cruelty" that justified an exceptional sentence and on that basis imposed a 90-month sentence. Interpreting the rule that it had first announced in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."), and then applied in *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002), the Court held in *Blakely* that, because "[t]he facts supporting that finding [of deliberate cruelty] were neither admitted by [the defendant] nor found by a jury," 124 S. Ct. at 2537, the "State's sentencing procedure did not comply with the Sixth Amendment," *id.* at 2538. The Court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537. See *ibid.* ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

The Court in *Blakely* did not reach the question whether *Blakely* applies to the federal Sentencing Guidelines. 124 S. Ct. at 2538 n.9. But the dissenting opinions stated that the majority's reasoning placed the Guidelines in jeopardy. *Id.* at 2549-2550 (O'Connor, J., dissenting); *id.* at 2561 (Breyer, J., dissenting). *Blakely* has indeed had the effect of raising questions about the Guidelines' validity that had previously been regarded as settled.

After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.[3] The uniform course of appellate decisions reasoned that "the holding in *Apprendi* applies only when the disputed 'fact' enlarges the applicable statutory maximum and the defendant's sentence exceeds the original maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). Because the Sentencing Guidelines cap the defendant's sentence at the maximum provided by statute for the offense of conviction,

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[3] See, *e.g.*, *United States* v. *Casas*, 356 F.3d 104, 128 (1st Cir.), cert. denied, 124 S. Ct. 2405 (2004); *United States* v. *Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), cert. denied, 124 S. Ct. 1185 (2004); *United States* v. *Parmelee*, 319 F.3d 583, 592 (3d Cir. 2003); *United States* v. *Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), cert. denied, 537 U.S. 936 (2002); *United States* v. *Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), cert. denied, 124 S. Ct. 2190 (2004); *United States* v. *Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States* v. *Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004); *United States* v. *Banks*, 340 F.3d 683, 684-685 (8th Cir. 2003); *United States* v. *Ochoa*, 311 F.3d 1133, 1134-1136 (9th Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), cert. denied, 537 U.S. 1063 (2002); *United States* v. *Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States* v. *Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003).

see Sentencing Guidelines § 5G1.1(a); 28 U.S.C. 994(b)(1) (Guidelines sentencing range must be "consistent with all pertinent provisions of title 18"), the Guidelines never lead to the imposition of a sentence on a particular count that exceeds the statutory maximum. For that reason, the courts of appeals uniformly held that judicial factfinding in the application of the Guidelines at sentencing is constitutional under *Apprendi*. This Court's decision in *Blakely* shattered that consensus.

B. The Courts Of Appeals Are In Conflict Over The Applicability Of *Blakely* To Federal Guidelines Sentencing

In the 27 days since *Blakely*, the federal courts have been thrown into conflict on the continuing validity of the current federal sentencing regime. One court of appeals has held that the current regime is unconstitutional in a wide range of cases. A second court of appeals has upheld the validity of the Guidelines consistent with this Court's prior precedent and suggested that any implications of *Blakely* for the Guidelines must be drawn by this Court, rather than the lower federal courts. A third court of appeals, sitting en banc, has taken the extraordinary step of certifying questions to this Court, urging it to grant expedited review to settle the applicability of *Blakely* to judicial factfinding that results in upward adjustments under the Sentencing Guidelines. Two other courts of appeals have already granted en banc consideration of the issue.

1. In this case, the Seventh Circuit determined that respondent's increased Guidelines sentence, based on the sentencing court's finding of facts as required under the Guidelines, denied respondent his right to a jury trial under *Blakely*, and that, therefore, "[t]he application of the guidelines in this case violated the Sixth Amendment." App., *infra*, 13a. The court of appeals reserved judgment on the impact of *Blakely* on cases in which no additional fact finding

beyond the jury verdict is necessary to apply the Guidelines. *Id.* at 9a, 13a. But the court's holding still applies to a large number of federal criminal cases, in which the defendant's sentence under the Guidelines is increased by the sentencing court's factual findings (other than a prior conviction), and the defendant has not consented to factfinding by the judge.[4]

2. In contrast, the Fifth Circuit reached the opposite conclusion in *United States* v. *Pineiro*, 2004 WL 1543170 (July 12, 2004). In that case, the sentencing court made certain factual findings about drug quantity and the defendant's role in the offense that resulted in a much higher sentencing range under the Guidelines than would have been applicable based on the facts found by the jury alone. The Fifth Circuit affirmed the sentence, concluding that "[h]aving considered the *Blakely* decision, prior Supreme Court cases, and our own circuit precedent, we hold that *Blakely* does not extend to the federal Guidelines and that [the defendant's] sentence did not violate the Constitution." *Id.* at *1. The court stated that it "d[id] not believe that the Sentencing Commission can be thought of as having created

[4] A number of district courts have reached the same conclusion. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), for example, the court held that "the inescapable conclusion of *Blakely* is that the federal sentencing guidelines have been rendered unconstitutional in cases such as this one," *id.* at *6, in which "the Guidelines require an upward enhancement of the defendant's sentencing range without a jury determination," *id.* at *9. See *e.g.*, *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004). District courts in a number of other still-unreported cases have also held that the *Blakely* rule applies to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Leach*, No. 02-172-14 (E.D. Pa. July 13, 2004); *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004), petition for cert. pending (filed July 21, 2004); *United States* v. *Toro*, 2004 WL 1575325 (D. Conn. July 8, 2004); *United States* v. *Montgomery*, 2004 WL 1535646 (D. Utah July 8, 2004); *United States* v. *Watson*, Cr. No. 03-0146 (D.D.C. June 30, 2004).

for each United States Code section a hundred different *Apprendi* 'offenses' corresponding to the myriad possible permutations of Guidelines factors, with each 'offense' then requiring jury findings on all of its (Guidelines-supplied) elements." 2004 WL 1543170, at *9.[5]

3. The disarray in the circuits is highlighted by the en banc Second Circuit's extraordinary order certifying to this Court questions pertaining to whether *Blakely* applies to sentencing under the Guidelines. *United States* v. *Penaranda*, 2004 WL 1551369 (2d Cir. July 12, 2004), certification docketed, No. 04-59 (July 13, 2004). The court of appeals found that it "cannot be certain whether a majority of [this] Court would extend the reasoning of *Blakely*" to the Guidelines. *Id.* at *4. The court observed that, while "[s]ome portions of the majority opinion in *Blakely* indicate that the decision does apply to the federal Sentencing Guidelines[,] * * * the distinct administrative provenance of the federal Sentencing Guidelines may place them outside the ambit of the *Blakely* principle." *Id.* at *5. And "even if *Blakely* applies to some aspects of sentencing under the Guidelines, it is unclear whether judicial fact-finding that determines the applicable Guidelines range is prohibited." *Id.* at *6.

The Second Circuit did not reach its own conclusions in *Penaranda*. Rather, it believed that the degree of uncertainty about the implications of *Blakely* raised such serious difficulties for the administration of criminal justice that this Court should have "an opportunity to adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." 2004 WL 1551369, at *7. To that end, the en banc court certified questions to this Court under

[5] A number of district courts have agreed that *Blakely* does not extend to the Sentencing Guidelines. See, *e.g.*, *United States* v. *Olivera-Hernandez*, No. 2:04CR0013 (D. Utah July 12, 2004); United *States* v. *Lazcano-Flores*, No. 04-45 (S.D. Iowa July 8, 2004); *United States* v. *Childs*, No. 03-2056 (N.D. Iowa July 8, 2004).

28 U.S.C. 1254(2) and urged it to "entertain this certification * * * at [the Court's] earliest convenience, with an expedited briefing and hearing schedule * * * in order to minimize, to the extent possible, what we see as an impending crisis in the administration of criminal justice in the federal courts." *Id.* at *8. The recognition by the Second Circuit that, without a Supreme Court ruling, "defendants, victims, and the public will be left uncertain about what sentences are lawful," 2004 WL 1551369, at *7, underscores the need for prompt intervention by this Court.[6]

C. The Lower Federal Courts Are Acutely In Need Of Guidance On The Proper Sentencing Procedures If *Blakely* Is Found Applicable To The Sentencing Guidelines

The Court should also grant review to settle the question that necessarily arises if this Court were to hold, contrary to the government's position, that the principles of *Blakely* preclude a sentencing court (absent the defendant's consent) from finding facts (other than a prior conviction) that increase a defendant's sentence under the Sentencing Guidelines beyond the level indicated based solely on the jury's findings or the defendant's admissions. That remedial question need not be reached if the Court agrees with the government that the federal system is distinguishable from

[6] The need for prompt resolution of the questions presented is further highlighted by the fact that two other courts of appeals have already granted en banc review of the application of *Blakely* to the Guidelines. A few days after the decision in this case, a panel of the Sixth Circuit concluded that, in light of *Blakely*, the federal sentencing scheme violates the Sixth Amendment in a broad swath of federal criminal cases. *United States* v. *Montgomery*, 2004 WL 1562904, at *2 (6th Cir. July 14, 2004). The Sixth Circuit then sua sponte granted rehearing en banc on the issue and vacated the panel's decision. See *United States* v. *Montgomery*, No. 03-5256 (6th Cir. July 19, 2004). The Fourth Circuit has also granted en banc consideration of the issue. *United States* v. *Hammoud*, No. 03-4253 (4th Cir. June 30, 2004) (argument scheduled for August 2, 2004).

the state statutory guidelines system at issue in *Blakely*. But if the Court were to disagree, the remedial issues that follow would be of critical importance to restoring order to the federal sentencing system. Indeed, a holding by this Court that *Blakely* applies to the Guidelines, without any guidance on the remedial consequences, would threaten to paralyze federal sentencing or compel an enormous waste of resources as courts struggle with "various attempts to implement *Blakely* [that] ultimately may prove misguided." *Penaranda*, 2004 WL 1551369, at *7.

1. The most important question would be one of severability. When a court finds some parts of a statutory scheme unconstitutional, the court must inquire into the severability of the remaining provisions. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). The question whether the unconstitutional provisions are severable turns on an assessment of whether Congress would have enacted the remaining provisions absent the others. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent."). When "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)), a statutory scheme is not severable and cannot stand in the face of the unconstitutionality of particular features. Under that analysis, if *Blakely* renders unconstitutional a judge's assessment of facts that increase a defendant's Guidelines sentence, the balance of the Sentencing Guidelines is not severable from the unconstitutional judicial factfinding procedures.

The novel scheme that would result from superimposing jury trials on the Guidelines sentencing process would give birth to a radically different system from the one that Con-

gress enacted and the Sentencing Commission created. The Guidelines serve the important goal of seeking to avoid unwarranted sentencing disparities between similarly situated defendants resulting from divergent judicial decisions in an indeterminate sentencing system. See *Koon* v. *United States*, 518 U.S. 81, 92 (1996); 28 U.S.C. 991(b)(1)(B); S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). The Guidelines were plainly designed and written for application by judges, *e.g.*, 28 U.S.C. 994(a)(1); Sentencing Guidelines § 6A1.3(b), and their complexity and holistic nature would defy coherent application with an overlay of *Blakely* procedures. The transformation of the jury into the factfinder on the myriad of issues that the Guidelines often require to be resolved would introduce procedural complications (*e.g.*, bifurcation, complicated jury instructions, elaborate special verdicts) that the federal system has never applied in the ordinary case. To superimpose *Blakely* on the Guidelines in pending cases awaiting sentencing could have the effect of precluding most upward adjustments that the Guidelines would require, because, as the court of appeals noted, there could be double jeopardy objections to reconvening a jury to decide facts relevant only to upward adjustments at sentencing. App., *infra*, 12a. That would seriously thwart the intention of Congress and the Commission to provide for sentences sufficient "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," and "to protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(2)(A), (B), and (C).

Accordingly, in any case in which *Blakely* would preclude the sentencing court from making findings required under the Guidelines, the Guidelines as a whole cannot be implemented as intended, and the court should therefore sentence the defendant in its discretion within the maximum and minimum provided by statute for the offense of conviction.

In doing so, the court should pay due regard to the relevant Guidelines provisions, as an informed and expert body of knowledge on sentencing issues.

2. Although the court of appeals in this case did not resolve how the district court should proceed on remand, the court recognized that the government's position that the Guidelines are not severable "may be right" and that "the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence * * * may not be severable from the substantive provisions of the guidelines." App., *infra*, 12a. In *United States* v. *Croxford*, 2004 WL 1521560 (D. Utah July 7, 2004), Judge Cassell reached that holding, concluding that the Guidelines were not severable. After a careful analysis of the options facing the court, see 2004 WL 1521560, at *10-*13, the court concluded that, in cases where the Guidelines require judicial factfinding on upward adjustments, *id.* at *9, it would sentence the defendant "by making a full examination of the relevant evidence and imposing an appropriate sentence within the statutory range set by Congress," *id.* at *13, while considering the "Guidelines as providing useful instruction on the appropriate sentence," *id.* at *15.[7]

3. In contrast, other courts that have applied *Blakely* to the Guidelines have persisted in applying the Guidelines framework, but have limited the sentencing court to the imposition only of a Guidelines sentence whose maximum term is supported by jury findings or admissions by the defendant. *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W.Va. June 30, 2004), exemplifies this approach. There, the court found that "the upper bound of the appro-

[7] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Einstman*, 2004 WL 1576622 (S.D.N.Y. July 14, 2004) (pre-sentencing memorandum and order); *United States* v. *Lamoreaux*, 2004 WL 1557283 (W.D. Mo. July 7, 2004).

priate [Guidelines] sentencing range, based on facts proven to a jury beyond a reasonable doubt or admitted by the defendant, establishes the relevant statutory maximum for *Apprendi* purposes." 2004 WL 1468561, at *8. The court conceded that that approach leads to "an artificial application of the Guidelines" because "in drug cases, the amounts of offense conduct and relevant conduct are integral to the determination of sentencing range." *Ibid.* The court nonetheless believed that it was bound to apply the Guidelines in that manner, and therefore reduced the defendant's sentence from imprisonment for 20 years to imprisonment for twelve months. *Id.* at *9.[8]

Under many Guidelines provisions, conviction of an offense, standing alone, triggers a low base offense level, with higher sentences keyed to a judge's findings that the offense involved aggravating factors. Under the fraud Guideline, for example, the base offense level is six or seven, corresponding to a sentence of 0-6 months of imprisonment, for conviction of a fraud offense, but the level can be increased up to 30 levels for the amount of the loss and other aggravating factors. Sentencing Guidelines § 2B1.1. At least in pending cases, in which the jury will not have found the aggravating facts, a conclusion that the Guidelines are severable could produce absurdly low sentences for very serious criminal conduct. See *United States* v. *Einstman*, 2004 WL 1576622, at *6 (S.D.N.Y. July 14, 2004) ("[I]t seems evident * * * that Congress would never have countenanced a Guidelines system in which all first-time offenders

[8] Other district courts have reached the same conclusion. See, *e.g.*, *United States* v. *Fanfan*, *supra* (reducing sentencing range from 188-235 months to 63-78 months of imprisonment); *Leach*, *supra* (reducing sentencing range from 360 months to life imprisonment to 210-262 months of imprisonment); *Watson*, *supra* (reducing sentence from 72 months to 16 months of imprisonment and immediately releasing the defendant); *Toro*, *supra* (reducing sentence from 24 months to 6 months of imprisonment).

who pled guilty to the elements of wire, mail or bank fraud, and nothing more, were limited to a sentence of 0-6 months * * * without regard to the amount of the fraud, its sophistication, or the role played by the defendant in the conspiracy. Such sentences make a mockery of the real (not 'relevant') statutory maxima that have been set by the Legislative Branch, and effectively eviscerate Congress's expressed intention that * * * a schemer who defrauds his employer be eligible for as much as five years in prison.").

4. Still other alternatives are possible. The court of appeals in this case observed that one potential approach would be to convene "a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised." App., *infra*, 11a. The court noted, however, that doing so would raise questions in any case, such as the present one, in which the necessary facts have not been alleged in the indictment. *Id.* at 12a. See also *Penaranda*, 2004 WL 1551369, at *7 (noting possibility of "recalling the jury that convicted the defendant to determine whether the facts warranting an enhancement under the Guidelines have been proven"). No sentencing court can be confident that any particular approach it selects will survive review under the rule ultimately laid down by this Court.

D. The Questions Presented Are Of Enormous Importance

The questions presented in this case are of great public importance and warrant immediate resolution.

1. First, a potentially enormous number of cases is involved. There are approximately 64,000 federal criminal defendants sentenced under the Guidelines each year. See United States Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics*, at Table 2. That means that an average of approximately 1200 federal sentencings take place each week. Given the current disarray, a very large

percentage of those cases may result in unlawful sentences. The number of federal cases affected by the questions presented in this case will increase daily until this Court is able to address the issues.

Second, the Court's resolution of the questions presented will significantly affect the length of sentences in many of those cases. In the short time since *Blakely*, many courts have reduced sentences below otherwise-applicable Guidelines levels; other courts have elected to move to indeterminate sentencing; and still others have adhered to the Sentencing Guidelines. The effect on the sentence can be substantial.

Third, the uncertainty about how to proceed with federal sentencing imposes burdens on prosecutors, defense counsel, and federal trial and appellate courts. Especially insofar as courts attempt to apply the Guidelines with a *Blakely* overlay of jury findings, a host of complicated procedural issues must be confronted. These would include instructing the jury on Guidelines factors that were never intended for its use (see, *e.g.*, the Relevant Conduct Guideline, § 1B1.3, and its nine pages of application notes); possibly bifurcating the trial into guilt and sentencing phases; and determining the proper procedures for *Blakely* waivers in guilty pleas. All of these issues, and many more, will be fruitful sources for extensive litigation and appeals. All this could turn out to be unnecessary depending on this Court's resolution of the questions presented.

Fourth, the ramifications of the current instability are unsettling areas beyond sentencing. Although approximately 97.1% of federal criminal cases are ordinarily resolved by guilty pleas, see United States Sentencing Comm'n, *supra*, at Fig. C, uncertainty about the sentencing regime that will be applied has made it more difficult for the government and defendants to reach plea agreements. Some defendants may decide to stand trial, rather than enter a plea without

knowing what sentencing process will apply to them.[9] The volume of criminal cases means that even a modest shift from pleas to trials could have enormous consequences for the federal system. Even an increase from 3% to 6% in the number of defendants who stand trial would double the volume of cases that must be adjudicated. That increase would greatly aggravate the burden on courts, prosecutors, defendants, and defense counsel.

2. Although the courts of appeals have disagreed on the merits, they have agreed on the need for this Court's prompt action. See App., *infra*, 2a ("We cannot of course provide definitive guidance; only the Court and Congress can do that."); *Pineiro*, 2004 WL 1543170, at *9 ("We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty; and then, if necessary, Congress can craft a uniform, rational, nationwide response."). As Judge Easterbrook noted, the "likely consequence" of holding the Guidelines unconstitutional is "bedlam," and, while the lower "courts are bound to favor different recipes" for sentencing, "[t]he Supreme Court alone can make a definitive judgment." App., *infra*, 14a (dissenting opinion). Judge Easterbrook concluded that "[t]oday's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon." *Ibid.*

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[9] On July 13, 2004, District Judge Cassell testified before the Senate Committee on the Judiciary that, in one district, *Blakely* has led to "delayed guilty pleas," "extended plea colloquies," and "added time and effort spent on cases which would have resulted in a plea but now require trial" and, in another, "pleas and sentencings have almost come to a halt." Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the Senate Judiciary Comm.*, 106th Cong., 2d Sess. at *8-*10 (2004) (statement of Hon. Paul Cassell, Judge, United States District Court Judge for the District of Utah), *available in* <http://judiciary.senate.gov/print_testimony.cfm?id=1260&wit_id=3669>.

The Second Circuit similarly implored the Court to act quickly to resolve the questions presented in its opinion in *Peneranda*. The court of appeals explained that *Blakely* "raises the prospect that many thousands of future sentences may be invalidated or, alternatively, that district courts simply will halt sentencing altogether pending a definitive ruling by the Supreme Court." *Penaranda*, 2004 WL 1551369, at *6. The court was "convinced that a prompt and authoritative answer to" what it termed "the pall of uncertainty" on federal sentencing "is needed to avoid a major disruption in the administration of criminal justice in the federal courts—disruption that would be unfair to defendants, to crime victims, to the public, and to the judges who must follow applicable constitutional requirements." *Ibid.* The court noted that "[m]any, if not all, of the[] various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary." *Id.* at *7. But "[i]n the meantime, * * * defendants, victims, and the public will be left uncertain as to what sentences are lawful." *Ibid.*

E. The Court Should Resolve The Questions Presented In This Case

The court of appeals squarely held that *Blakely*'s Sixth Amendment holding extends to the Guidelines, and this Court should promptly review that holding. The question whether any unconstitutional aspects of the Guidelines scheme are severable from the remainder is also properly raised in this petition. The Court should grant review to address that issue as well, if *Blakely* is held applicable to the Guidelines.

1. Although the court of appeals remanded for the district court to determine how to proceed at sentencing, rather than resolving that issue itself, the court of appeals' action does not detract from the appropriateness of granting certiorari on that issue. The Court has jurisdiction to do so.

A grant of certiorari would bring before the Court the entire case, including the severability question of how, if *Blakely* applies to the Guidelines, the sentencing court is to proceed on remand. See 28 U.S.C. 2106 ("The Supreme Court * * * may affirm, *modify*, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause and * * * require such further proceedings to be had as may be just under the circumstances.*") (emphasis added). In instances in which the Court has confronted questions of law that "are currently in a state of evolving definition and uncertainty," *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), it has reached the merits, despite procedural obstacles, in order to settle an "important" issue that "appears likely to recur." Cf. *id.* at 257 (overlooking the plain error rule where declining to review the issue on the merits "would serve neither to promote the interests of justice nor to advance efficient judicial administration").[10] While the Court normally does not review an issue not presented or passed on below, in exceptional cases, it will. See *Carlson* v. *Green*, 446 U.S. 14 (1980) (deciding question not pressed or passed on in the lower courts, because it "is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case," and "the interests of judicial administration will be served by addressing the issue on its merits.").

In *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in the context of an earlier challenge to the Guidelines, this

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[10] See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (reaching issue decided, though not pressed, below because of the "uncertainty" surrounding the issue and its "importance to the administration of federal law"); see also *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (resolving legal standards governing principal's liability for punitive damages for actions of its agents under Title VII, although the court below did not reach that issue).

Court granted certiorari on a severability question presented by the government that had not been decided below. In that case, the district court had ruled that the Sentencing Guidelines were constitutional, and it therefore did not reach any issue of severability. Both the government and the defendant petitioned for certiorari before judgment in *Mistretta*. The government's petition presented three questions. Two of them addressed the constitutionality of the Guidelines—the only question addressed by the district court. 87-1904 Pet. at i. The third question, however, was "[w]hether, if the sentencing guidelines are invalid, the 1984 amendments to the statutes governing parole and 'good time' credits are severable and therefore apply to defendants sentenced for crimes committed after November 1, 1987." *Ibid.* The petition explained that the issue was of great importance, that it had divided the district courts, and that, if the Court struck down the Guidelines without resolving the issue, "the current confusion within the federal sentencing system will continue until another case raising those issues reaches this Court." *Id.* at 18. The defendant's petition also presented a severability question, 87-7028 Pet. at i, 7-9, noting that "[i]n order to prevent mass confusion and a flood of federal *habeas corpus* petitions * * *, this Court should address the severability question in this proceeding." *Id.* at 9. The Court granted certiorari on both petitions in full. 486 U.S. 1054 (1988). The same logic dictates a grant of certiorari on the severability issue in this case.

2. The government is also filing today a petition for a writ of certiorari before judgment in *United States* v. *Fanfan*, No. 03-47-P-H (D. Me. June 28, 2004), appeal pending, No. 04-1946 (1st Cir. docketed July 19, 2004). In *Fanfan*, the district court determined that the rule in *Blakely* is applicable to the Guidelines, and it went on to hold that the court was therefore limited to sentencing the defendant to a maximum term under the Guidelines based

solely on the facts found by the jury. Applying a Guidelines range of 63-78 months, rather than the range of 188-235 months that it found that the Guidelines otherwise required, the court sentenced the defendant to a term of 78 months of imprisonment. *Fanfan* thus resolved both questions presented in the petition in this case, and it provides an appropriate companion vehicle for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing. The government suggests that the Court grant the petitions both in this case and in *Fanfan* to assure that the Court has a vehicle in which to reach and resolve the vitally important issues presented. Simultaneous grants of review here and in *Fanfan* would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues.

3. The en banc Second Circuit has certified three questions to this Court under 28 U.S.C. 1254(2), urging the Court to decide "the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines." *United States* v. *Penaranda*, 2004 WL 1551369, at *7. While the government agrees with the Second Circuit on the need for expedited resolution of that issue, *Penaranda* provides a less suitable vehicle for resolving the issues than this case and *Fanfan*. First, each of the Second Circuit's certified questions is a variation on the same theme: whether *Blakely* applies to the Guidelines. Unlike the petition in this case, the Second Circuit's certification order does not encompass any question concerning the consequences of holding *Blakely* applicable to the Guidelines. That is not because the Second Circuit regards that issue as unimportant. The court of appeals clearly recognized that "once a court concludes that *Blakely* applies to the Guidelines, it is without guidance as to the means for achieving compliance," *Penaranda*, *id.* at *7, and graphically illustrated the vital need for resolution of that issue by cataloguing five different approaches taken by

district courts and noting the uncertainty that will prevail "while these judicial approaches are being litigated." *Ibid.* But the Second Circuit's certified questions would not permit the Court to reach and resolve those remedial issues. In contrast, the petition for certiorari here squarely raises that issue.

Second, both of the two defendants involved in the *Penaranda* certification (Penaranda and Rojas) raised other issues on appeal.[11] If Penaranda is successful in obtaining a new trial, his sentencing challenges would become moot, at least pending conviction at a retrial. The same might not be true for Rojas, who challenges only the procedures at sentencing, but an advantage of the petition in this case is that the court of appeals has rejected all other challenges raised by the defendant aside from the *Blakely* challenge. App., *infra*, 22a.

Finally, in this case the Court has the benefit of a concrete judgment examining the applicability of *Blakely*; in *Penaranda*, no court has rendered a decision resolving the *Blakely* issues. This case also has the benefit of questions presented that were formulated by the petitioning party, in accordance with the customary practice of this Court. The adversary system contemplates that the parties will normally frame the questions for courts to review. While Congress has retained certification by a court of appeals as a

[11] In *United States* v. *Rojas*, No. 03-1062(L), the defendant has raised the issue "[w]hether Mr. Rojas' Sixth Amendment rights were violated by the government's suppression of evidence at the *Fatico* [sentencing] hearing." Br. 2, 17-22 (filed Dec. 9, 2003). In *United States* v. *Penaranda*, No. 03-1284(L), the defendant raises three issues challenging the fairness of his trial and seeking a new trial. Br. 4-5, 60 (filed Sept. 18, 2003). The Second Circuit did not grant en banc review on those issues, but instead left them for resolution "in the normal course by the panels to which the cases are assigned." *Penaranda*, at *1 n.1; see *id.* at *8 n.10 (noting that court's transmission of the records to this court was "not to suggest that the Court should decide the entirety of the matters in controversy").

mode of Supreme Court review, it has rarely been employed in recent years. See Robert L. Stern, et al., *Supreme Court Practice* §§ 9.1, 9.3 (8th ed. 2002). Adherence to the normal adversary mode of review has the advantage of settled and well-understood procedures.[12]

F. Expedited Review Is Warranted

In light of the urgent need for this Court's resolution of the questions presented and the thousands—or even tens of thousands—of criminal sentencings that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should consider setting a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration, proposing schedules for the Court's hearing of this case and *United States* v. *Fanfan*. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes a schedule that would give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would allow for

[12] After deciding this case and *Fanfan*, the Court could dispose of *Penaranda* as appropriate. Cf. *Iran Nat'l Airlines Corp.* v. *Marschalk Co.*, 453 U.S. 919 (1981) (disposing of certified questions in light of Court's decision on merits in case raising similar issue).

argument on the first scheduled day of the October 2004 Term, with corresponding adjustments to the briefing schedule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-4225

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FREDDIE J. BOOKER, DEFENDANT-APPELLANT

Argued July 6, 2004
Decided July 9, 2004

Appeal from the United States District Court for the Western District of Wisconsin, No. 03-CR-026-S-01-John C. Shabaz, Judge

POSNER, Circuit J.

A jury found the defendant guilty of possessing with intent to distribute at least 50 grams of cocaine base, for which the statute prescribes a minimum sentence of 10 years in prison and a maximum sentence of life. 21 U.S.C. § 841(b)(1)(A)(iii). At sentencing, the judge found by a preponderance of the evidence that the defendant (1) had distributed 566 grams over and above the 92.5 grams that the jury had to have found (for the defendant did not contest that it was the amount of crack in his duffel bag—he just claimed he hadn't put it there) and (2) had obstructed justice. Under the federal sentencing guidelines, the additional quantity finding

increased the defendant's base offense level from 32 to 36, U.S.S.G. §§ 2D1.1(c)(2), (4). The effect, together with that of the enhancement that the guidelines prescribe for obstruction of justice, U.S.S.G. § 3C1.1, was to place the defendant in a sentencing range of 360 months to life. The judge sentenced him to the bottom of the range. The appeal challenges the sentence on the ground that the sentencing guidelines violate the Sixth Amendment insofar as they permit the judge to find facts (other than facts relating to a defendant's criminal history) that determine the defendant's sentencing range. There is also a challenge to the conviction, based on the judge's limiting the scope of cross-examination, but so obviously harmless was that error (if it was an error) that we will move immediately to the sentencing issue.

We have expedited our decision in an effort to provide some guidance to the district judges (and our own court's staff), who are faced with an avalanche of motions for resentencing in the light of *Blakely* v. *Washington*, — U.S. —, 124 S. Ct. 2531, — L. Ed. 2d —, 2004 WL 1402697 (U.S. June 24, 2004), which has cast a long shadow over the federal sentencing guidelines. We cannot of course provide definitive guidance; only the Court and Congress can do that; our hope is that an early opinion will help speed the issue to a definitive resolution.

Blakely invalidates under the Sixth Amendment (which had of course long been held applicable to state criminal proceedings by an interpretation of the Fourteenth Amendment) a statute of the State of Washington that authorized the sentencing judge to impose a sentence above the "standard range" set forth in the statute punishing the offense if he found any aggravat-

ing factors that justified such a departure; pursuant to this grant of authority, the judge had imposed a sentence of 90 months on the defendant. which exceeded the standard range of 49 to 53 months for his offense, second-degree kidnapping.

The Supreme Court had already held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Blakely* it let the other shoe drop and held over pointed dissents that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely* v. *Washington, supra*, at *4. "In other words, the *relevant* 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* (citation omitted). "[W]ithout" is italicized in the original; we have italicized "relevant" to underscore the difference between the maximum sentence in the statute, and the maximum sentence—what the Supreme Court regards as the "relevant statutory maximum"—that the judge can impose without making his own findings, above and beyond what the jury found or the defendant admitted or, as here, did not contest.

The maximum sentence that the district judge could have imposed in this case (without an upward depar-

ture), had he not made any findings concerning quantity of drugs or obstruction of justice, would have been 262 months, given the defendant's base offense level of 32 U.S.S.G. § 2D1.1(c)(4) (32 is the base offense level when the defendant possessed at least 50 grams but less than 150 grams of crack), and the defendant's criminal history. U.S.S.G. §§ 4A1.1(a)-(e), 2(c)(1). True, that maximum is imposed not by the words of a federal statute, but by the sentencing guidelines. Provisions of the guidelines establish a "standard range" for possessing with intent to distribute at least 50 grams of cocaine base, and other provisions of the guidelines establish aggravating factors that if found by the judge jack up the range. The pattern is the same as that in the Washington statute, and it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency. In its decision upholding the guidelines against delegation and separation of powers challenges, the Supreme Court had stated that "although Congress granted the Commission substantial discretion in formulating the guidelines, in actuality it legislated a full hierarchy of punishment—from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives—and stipulated the most important offense and offender characteristics to place defendants within these categories" and that "in contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either

within the 180-day waiting period or at any time." *Mistretta v. United States*, 488 U.S. 361, 377, 393-94, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (citation omitted).

It would seem to follow, therefore, as the four dissenting Justices in *Blakely* warned, *Blakely* v. *Washington, supra*, at *16-17 (O'Connor, J., dissenting); *id.* at *29 (Breyer, J., dissenting); and several district judges have already ruled, e.g., *United States* v. *Croxford*, 2004 WL 1521560, at *7, *13 (D. Utah July, 7, 2004); *United States* v. *Medas*, 2004 WL 1498183, at *1 (E.D.N.Y. July 1, 2004); *United States* v. *Shamblin*, 2004 WL 1468561, at *8 (S.D. W. Va. June 30, 2004), that *Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge. The majority in *Blakely*, faced with dissenting opinions that as much as said that the decision doomed the federal sentencing guidelines, might have said, no it doesn't; it did not say that.

The qualification "based on facts found by a judge" is critical. Nothing in *Blakely* suggests that Congress cannot delegate to the Sentencing Commission the authority to decree that possession with intent to distribute 658.5 grams of cocaine base shall be punished by a sentence of at least 360 months though the statutory minimum is only 10 years. All it cannot do under *Blakely* is take away from the defendant the right to demand that the quantity be determined by the jury rather than by the judge, and on the basis of proof beyond a reasonable doubt. The government argues that all the guidelines do is regularize the discretion that judges would exercise in picking a sentence within a statutory range. *Mistretta* v. *United States, supra*, 488 U.S. at 395. If that were indeed all, that would be fine. And indeed to a great extent the system of the

guidelines, with its sentencing ranges and upward and downward departures, limits rather than extinguishes sentencing discretion. But the issue in *Blakely* was not sentencing discretion—it was the authority of the sentencing judge to find the facts that determine how that discretion shall be implemented and to do so on the basis of only the civil burden of proof. The vices of the guidelines are thus that they *require* the sentencing judge to make findings of fact (and to do so under the wrong standard of proof), e.g., 18 U.S.C. §§ 3553(a)(4), (5); 1B1.1, 3(a), 6A1.3(b); *Edwards* v. *United States*, 523 U.S. 511, 513-14, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998); United *States* v. *Bequette*, 309 F.3d 448, 450-51 (7th Cir. 2002); *United States* v. *Jackson*, 300 F.3d 740, 749 (7th Cir. 2002); *United States* v. *Guzman*, 318 F.3d 1191, 1197-98 (10th Cir. 2003); *United States* v. *Lopez*, 219 F.3d 343, 348 (4th Cir. 2000), and that the judge's findings largely determine the sentence, given the limits on upward and downward departures, 18 U.S.C. §§ 3553(b), (e), (f); U.S.S.G. § 5K2.0; *Koon* v. *United States*, 518 U.S. 81, 92, 96, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *United States* v. *Sherman*, 53 F.3d 782, 788-89 (7th Cir. 1995); *United States* v. *Lafayette*. 337 F.3d 1043, 1052 D.C. Cir. 2003); cf. *United States* v. *Cruz*, 317 F.3d 763, 766 (7th Cir. 2003). The finding of facts (other than the fact of the defendant's criminal history) bearing on the length of the sentence is just what the Supreme Court in *Blakely* has determined to be the province of the jury.

Of course, under almost any sentencing regime some residual discretion is vested in the sentencing judge; and to the extent that his exercise of discretion is influenced by the facts of the case, if only the facts that he may have glear ed concerning the defendant's char-

acter, remorse, health, and so on, judicial factfinding enters the sentencing process. But there is a difference between allowing a sentencing judge to consider a range of factors that may include facts that he informally finds—the pre-guidelines regime, under which "once it [was] determined that a sentence [was] within the limitations set forth in the statute under which it [was] imposed, appellate review [was] at an end," *Dorszynski* v. *United States*, 418 U.S. 424, 431, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974), though sentences would occasionally be reversed because the district judge had relied on an impermissible consideration, e.g., United *States* v. *Maples*, 501 F.2d 985 (4th Cir. 1974), failed to exercise discretion, or based the sentence on false information, e.g., *Townsend* v. *Burke*, 334 U.S. 736, 741, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948)—and commanding him to make factfindings and base the sentence (within a narrow band) on them. The latter is what Washington's sentencing guidelines did, and there is no basis for thinking that *Blakely* would have been decided differently had the identical guidelines been promulgated, with the identical effect on sentences, by the Washington Sentencing Commission. The Court in *Blakely* was well aware of the difference, stating that factfinding by judges and parole boards under indeterminate sentencing regimes are permissible because "the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." *Blakely* v. *Washington*, *supra*, at *7 (emphasis in original).

It is tempting to think that maybe the guidelines can be saved by imagining the Sentencing Commission as a kind of superjudge who elaborates a code of sentencing

principles much as a thoughtful real judge, operating in a regime of indeterminate sentencing, might do informally in an effort to try to make his sentences consistent. But the same reasoning would if accepted have saved Washington's sentencing guidelines, unless an administrative agency is to be deemed a more responsible, a more authoritative, fount of criminal law than a legislature. The four dissenting Justices in *Blakely* were unable to identify a meaningful difference between the Washington sentencing guidelines and the federal sentencing guidelines. A fifth Justice—Justice Scalia, the author of the majority opinion in *Blakely*—had dissented in *Mistretta* on the ground that the federal sentencing guidelines were indeed laws, not judicial pronouncements. *Mistretta* v. *United States*, *supra*, 488 U.S. at 413-27. And Justice Scalia, now speaking for a majority of the Court, in *Blakely*, though he replied to the dissenting Justices at length, did not say that they were wrong to suggest that the federal sentencing guidelines could not be distinguished from the Washington sentencing guidelines. Instead he said: "By reversing the judgment below, we are not, as the State would have it, 'find [ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely* v. *Washington*, *supra*, at *7. No distinction between the Washington statute and other schemes of determinate sentencing, such as the federal sentencing guidelines on which the dissenting Justices had dwelled at such length, is suggested.

As an original matter, then, we think that the guidelines, though only in cases such as the present one

in which they limit defendants' right to a jury and to the reasonable-doubt standard, and thus the right of defendant Booker to have a jury determine (using that standard) how much cocaine base he possessed and whether he obstructed justice, violate the Sixth Amendment as interpreted by *Blakely*. We cannot be certain of this. But we cannot avoid the duty to decide an issue squarely presented to us. If our decision is wrong, may the Supreme Court speedily reverse it.

We are mindful of the Supreme Court's ukase that the lower federal courts are not to overrule a Supreme Court decision even if it seems manifestly inconsistent with a subsequent decision, unless the subsequent decision explicitly overruled the earlier one. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). The government argues that the guidelines were upheld against a Sixth Amendment challenge in *Edwards* v. *United States*, *supra*, 523 U.S. at 515, and if this is right we shall have to affirm Booker's sentence whatever our independent view of the guidelines' consistency with *Blakely*. (The government also mentions *United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam), a double-jeopardy case, and other Supreme Court decisions that rebuff various constitutional challenges to the guidelines—but not a Sixth Amendment challenge. Pre-*Blakely* decisions by lower federal courts rebuffing a Sixth Amendment challenge are of course no longer authoritative.) We do not think it is right. None of the opinions in *Blakely* cites *Edwards*. The majority opinion in *Blakely* states that "the Federal Guidelines are not before us, and we express no opinion on them," *Blakely* v. *Washington*, *supra*, at *6 n.9; it does not state that they were upheld against a Sixth Amendment challenge

in *Edwards* or any other case. (They were not, as we'll see.) When the Supreme Court says that it is not resolving an issue, it perforce confides the issue to the lower federal courts for the first pass at resolution.

The Court could have said in footnote 9 that the question whether to overrule *Edwards* was not before it. It did not say that. That is not surprising. The opinion in *Edwards* does not mention the Sixth Amendment or the constitutional right to a jury trial, and indeed states that "we need not, and we do not, consider the merits of petitioners' statutory and constitutional claims." 523 U.S. at 516. The Court did say that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for cocaine," *id.* at 515, which may mean that their constitutional claims (a mishmash of claims under different provisions of the Constitution, including however the Sixth Amendment) did not matter *because* the sentences did not exceed the statutory maximum. This was of course the understanding before *Blakely*, but *Blakely* redefined "statutory maximum." An assumption is not a holding.

The Court in *Edwards* was affirming a decision by this court, reported at 105 F.3d 1179 (7th Cir. 1997), which does not mention the Sixth Amendment or the constitutional right to a jury trial or any other constitutional issue. That would hardly have been oversight on the part of the opinion's author. The Supreme Court said that it was granting certiorari in *Edwards* to resolve a conflict over the question whether "the Sentencing Guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy." 523 U.S. at

513. None of the other cases it cited for the existence of the conflict mentions the Constitution either. *United States* v. *Bounds*, 985 F.2d 188, 194-95 (5th Cir. 1993); *United States* v. *Pace*, 981 F.2d 1123, 1128-30 (10th Cir. 1992); *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990).

And, finally, the petitioners in *Edwards* did not argue that the sentencing guidelines are unconstitutional. They did not say that the guidelines establish a sentencing structure that violates the Sixth Amendment. The most that can be dug out of their briefs, so far as bears on that issue, is that they were urging a statutory interpretation that would *avoid* a Sixth Amendment issue. The Court did not opine on the guidelines' consistency with the amendment because that consistency was not challenged. It did not rebuff a Sixth Amendment challenge to the guidelines because there was no Sixth Amendment challenge to the guidelines. We are obligated therefore to make our own constitutional determination.

We conclude that Booker has a right to have the jury determine the quantity of drugs he possessed and the facts underlying the determination that he obstructed justice. The judgment must therefore be reversed and the case remanded for resentencing. If the government does not object, the judge can simply sentence Booker to 262 months, since the choice of that sentence would not require any judicial factfinding. But if the government wants a higher sentence or unless, as explained below, the guidelines are not severable, then Booker, unless he strikes a deal with the government, will be entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised.

There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if and only if it finds liability, determines damages. Separate hearings before a jury on the issue of sentence is the norm in capital cases.

Of course this will not work if the facts that the government would seek to establish in the sentencing hearing are elements of a statutory offense, for they would then have to be alleged in the indictment, and to re-indict at this stage would present a double-jeopardy issue. We can hardly attempt to resolve such issues on this appeal; the parties have not briefed or argued them. It would be doubly premature to address them, in light of the recent announcement by the Department of Justice that it believes that if *Blakely* is applicable to the guidelines, the "entire system" of the guidelines "must fall." "Departmental Legal Positions and Policies in Light of *Blakely v. Washington*," Memorandum to All Federal Prosecutors from James Comey, Deputy Attorney General of the United States, p. 3 (July 2, 2004). The Department may be right; the aspect of the guidelines that we believe to be unconstitutional, namely the requirement that the sentencing judge make certain findings that shall operate as the premise of the sentence and that he make them on the basis of the preponderance of the evidence, may not be severable from the substantive provisions of the guidelines. That is a question of legislative intent. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999). The practical effect just of upping the burden of persuasion in sentencing hearings will be to reduce the average sentence, and Congress might prefer a return to

indeterminate sentencing (within the statutory ranges). In that event the guidelines would be invalid in their entirety, except, of course, as information that some judges would continue to give great weight to. But severability is another issue that has not been briefed or argued to us.

It might seem that if the substantive portions of the guidelines are not severable from the requirement that the judge find the facts relevant to the sentence, a 262-month sentence would be illegal. We do not think so. If the guidelines fall, the judge is free as he was before the guidelines were promulgated to fix any sentence within the statutory range, and the range for Booker, remember, is 10 years to life. Since the fall of the guidelines is a quite possible outcome, it would be prudent for the judge in any event to select a fall-back sentence.

To summarize: (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements—that is, no factual findings by the judge increasing the sentence—there is no constitutional violation in applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence.

REVERSED AND REMANDED.

EASTERBROOK, Circuit Judge, dissenting.

My colleagues hold that, after *Blakely* v. *Washington*, No. 02-1632 (U.S. June 24, 2004), judicial application of the Sentencing Guidelines violates the defendant's right to trial by jury under the sixth amendment. I disagree with that holding on both procedural and substantive grounds. This is the wrong forum for such a conclusion; and whatever power we may possess should not be exercised to set at naught a central component of federal criminal practice.

Procedure first. The Supreme Court alone is entitled to declare one of its decisions defunct. Even if later decisions wash away the earlier one's foundation, still the power to administer the coup de grâce belongs to our superiors. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); *Rodriguez de Quijas* v. *Shearson/American Experss, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). The alternative is bedlam—which is the likely consequence of today's decision. A court of appeals cannot replace the Guidelines with something else; the list of non-exclusive options at the end of the majority's opinion is our home-brewed formula, and other courts are bound to favor different recipes as 900 district and circuit judges fumble for solutions. The Supreme Court alone can make a definitive judgment.

In order to reach the result they do, my colleagues must conclude that *Edwards* v. *United States*, 523 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998), was wrongly decided. Our portfolio as intermediate judges in a hierarchical system does not include the authority to make such declarations. True enough, *Edwards* does not contain the phrase "sixth amendment." But an argument based on the sixth amendment was made to

the Court: defendants insisted that, if the Guidelines and statutes were read as the United States and the Justices themselves did, that would deprive them of their right to a jury trial. The Court's opinion in *Edwards* acknowledged that constitutional contentions had been advanced. *Edwards* held that a judge nonetheless may ascertain (using the preponderance standard) the type and amount of drugs involved, and impose a sentence based on that conclusion, as long as the sentence does not exceed the statutory maximum. According to my colleagues: "This was of course the understanding before *Blakely*, but *Blakely* redefined 'statutory maximum.'" Slip op. 8. Maybe so, but *if* so it is just a reason why *Edwards* is on its last legs. It does not imply that we are entitled to put it in a coffin while it is still breathing.

Just as opera stars often go on singing after being shot, stabbed, or poisoned, so judicial opinions often survive what could be fatal blows. Think of *Lemon* v. *Kurtzman*, 411 U.S. 192, 93 S. Ct. 1463, 36 L. Ed. 2d 151 (1973), which is incompatible with later decisions, has been disparaged by most sitting Justices, yet has not been overruled. Closer to the mark *is Almendarez-Torres* v. *United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), decided one month before *Edwards* and, like it, in tension with *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), on which *Blakely* rests. *Almendarez-Torres* holds that juries need not be asked to determine a defendant's criminal history even for purposes of recidivist statutes that use convictions to increase the maximum sentence. Four Justices, dissenting in *Almendarez-Torres*, made the arguments that were to carry the day two years later in *Apprendi*, when they

were joined by Justice Thomas, who had been in the *Almendarez-Torres* majority. See 523 U.S. at 248-71 (Scalia, J., joined by Stevens, Souter & Ginsburg, JJ ., dissenting). Justice Thomas wrote that he now considers *Almendarez-Torres* wrongly decided. *Apprendi*, 530 U.S. at 518-21 (Thomas, J., concurring). One might think *Almendarez-Torres* doomed, but it has not been overruled, and *Blakely* repeats a formula that carves out recidivist enhancements. We routinely apply *Almendarez-Torres*, saying that its fate rests with the Supreme Court alone. *Edwards* should receive the same treatment.

To support the view that *Edwards* no longer is authoritative, the majority notes that none of the opinions in *Blakely* cited it. Why would it pass without mention if it is a (logical) casualty of *Blakely?* Well, one reason could be that *Edwards* is *not* a logical casualty; that's the substantive question I discuss later. The other is that the question was left undecided. *Blakely* tells us: "The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them." Slip op. 9 n.9. Having disclaimed views about the Guidelines, the Justices had no occasion to parse *Edwards*. I find it odd that my colleagues should focus on what the Court did *not* do (cite *Edwards*) while slighting what it *did* do (declare that analysis of the federal Guidelines is a different kettle of fish). What's more, although the Court did not attend to *Edwards* in *Blakely*, it did so in *Apprendi* itself, writing:

> The principal dissent . . . treats us to a lengthy disquisition on the benefits of determinate sentencing schemes, and the effect of today's decision on the federal Sentencing Guidelines. *Post*, at 544-552. The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. See, *e.g.*, *Edwards* v. *United States*, 523 U.S. 511, 515, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) (opinion of Breyer, J., for a unanimous court) (noting that "[o]f course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. [United States Sentencing Commission, Guidelines Manual § 5G1.1 (Nov.1994)]").

530 U.S. at 497 at 497 n.21. So the Justices see the links connecting the sixth amendment, *Apprendi*, *Edwards*, statutory maximums, and the federal Sentencing Guidelines. It is for them, not us, to say that as a result of *Blakely* this linkage scuttles *Edwards*. (Other casualties of the majority's approach are *United States* v. *Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997), which holds that a judge may increase a sentence based on relevant conduct of which the defendant had been acquitted by the jury, and *United States* v. *Dunnigan*, 507 U.S. 87, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993), which holds that to decide whether the defendant receives a higher sentence for obstructing justice the judge may (indeed must) decide independently of the jury whether the defendant committed perjury at trial. See also *McMilllan* v. *Pennsylvania*,

477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), which *Blakely* distinguished, but which on my colleagues' view is a dead letter.)

Now to substance. *Apprendi* establishes, 530 U.S. at 490 and *Blakely* reiterates, slip op. 5, this rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Shortly after *Apprendi* was released, we held that the "statutory maximum" means whatever statutory criteria make a person eligible for a given punishment. Consider 21 U.S.C. § 841, which establishes three maximums for cocaine-distribution offenses: distribution of any quantity permits a sentence up to 20 years (§ 841(b)(1)(C); distribution of more than 500 grams (or 5 grams of cocaine base) raises the maximum to 40 years (§ 841(b)(1)(B)(i), (iii), distribution of more than 5 kilograms (or 50 grams of cocaine base) raises the statutory maximum to life (§ 841(b)(1)(A)(i), (iii). In *United States* v. *Nance*, 236 F.3d 820, 824-25 (7th Cir. 2000), we held that the thresholds (500 grams and 5 kilograms) must be charged in the indictment and established beyond a reasonable doubt to the jury's satisfaction (if the defendant does not waive jury trial or admit the quantities). Otherwise the maximum is 20 years. Once the trier of fact has determined that the defendant distributed at least 500 grams or 5 kilograms, the sixth amendment has been satisfied and choosing a sentence below the statutory limit is for the judge alone, on the preponderance of the evidence. See, e.g., *Talbott* v. *Indiana*, 226 F.3d 866, 869-70 (7th Cir. 2000).

Blakely is the Supreme Court's analog to *Nance*. Just as § 841 provides a maximum of life imprisonment

for distributing cocaine only if the defendant distributed at least 5 kilograms (or 50 grams of cocaine base)—otherwise the maximum is 20 or 40 years—so Washington establishes a 10-year maximum sentence for second-degree kidnapping, but (according to a second statute) only if the defendant acted with "deliberate cruelty"—otherwise the maximum is 3 years. Washington contended that the relevant "statutory maximum" was 10 years; this is equivalent to arguing that the "statutory maximum" in *all* federal cocaine prosecutions is life. The Court disagreed and held that the relevant "statutory maximum" is the lowest of all arguably pertinent statutory caps, unless the jury makes the finding that raises the limit.

According to my colleagues, *Blakely* goes beyond what was necessary to decide the validity of Washington's system by giving this definition of "statutory maximum":

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," . . . and the judge exceeds his proper authority.

Slip op. 7 (emphasis in original). I do not see here the startling consequences my colleagues find. This says exactly what we held in *Nance:* one must start with the lowest statutory maximum and ask the jury to make findings that raise the sentence to which the defendant is exposed.

Blakely arose from a need to designate one of two statutes as the "statutory maximum". Washington called its statutes "sentencing guidelines," but names do not change facts. Nonetheless, the reading my colleagues give to this passage is that it does not matter whether the maximum is statutory; any legal rule, of any source (statute, regulation, guideline) that affects a sentence must go to a jury. Certainly *Blakely* does not hold that; it *could not* "hold" that given that it dealt with statutes exclusively. Attributing to *Blakely* the view that it does not matter whether a given rule appears in a statute makes hash of "statutory maximum." Why did the Justices deploy that phrase in *Apprendi* and repeat it in *Blakely* (and quite a few other decisions)? Just to get a chuckle at the expense of other judges who took them seriously and thought that "statutory maximum" might have something to do with statutes? Why write "statutory maximum" if you mean "all circumstances that go into ascertaining the proper sentence"?

Going *Blakely* one better, today's majority says that as a matter of constitutional law there *cannot* be any difference between statutes and other sources of rules: "it is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." Slip op. 3-4. For the vital proposition that anything functionally equivalent to a statute (from the perspective of a criminal defendant) must be treated *as* a statute, the majority

cites—nothing. Phrases such as "it seems plain" are poor substitutes for authority in the Constitution's text or interpretive history.

The majority's proposition is refuted by *Blakely* itself, which tells us that legislatures *may* delegate such issues to the judiciary and parole boards without offending the sixth amendment. The Court considered whether there would be a constitutional problem with open-ended sentencing, such as a statute allowing any person convicted of burglary to be sentenced to any term of years up to 40. *Blakely*, slip op. 12-14. If the law left that decision to the judiciary, the court said, there would be no problem even if the sentencing judge applied (as a matter of common law) the rule "10 years unless the burglar uses a gun; if a gun, then 40 years." Put that algorithm in a statute and the sixth amendment commits to the jury the question whether the burglar was armed; put the same algorithm in a judicial opinion and the sixth amendment allows the judge to make the decision. The Court saw this not as an "evasion" but as a natural application of the Constitution.

"Statutory" in the phrase "statutory maximum" is not an inept short-hand. *Apprendi* and *Blakely* hold that the sixth amendment allocates to the jury all elements of the offense, plus all statutory details that are enough like elements that differences in phraseology should not be allowed to affect the defendant's rights. Example: the statutory quantity thresholds in § 841 are not "elements" of that offense, see *United States* v. *Bjorkman*, 270 F.3d 482 (7th Cir. 2001), because a low quantity does not lead to acquittal; distributing any detectable quantity is a criminal offense. But the statute works much as if Congress had enacted

multiple degrees of a crime. Just as the distinctions between manslaughter and first-degree murder (such as malice aforethought) must be proved to a jury's satisfaction, so the distinctions between simple and aggravated distribution must be shown. *Blakely* treated Washington has having established three degrees of kidnapping: the distinction between second- and third-degree kidnapping was deliberate cruelty. Having embedded this distinction in its statute books, the Court held, Washington could not cut the jury out of the process. This understanding of the sixth amendment has *nothing* to do with sentencing if there is only one degree of an offense (the Court's example of burglary with a 40-year maximum), or if the defendant has been convicted of the highest degree. Booker has been convicted of "cocaine distribution in the first degree" and the jury's verdict authorizes life imprisonment. What happens after that is unrelated to the sixth amendment. This is why the rule of *Apprendi* and *Blakely* is confined to statutes, why they do not affect statutory minimum sentences, see *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), why regulations and guidelines that affect sentencing after the "degree" of an offense has been fixed by the jury do not transgress the limits set by the sixth amendment, and why (capital punishment aside) *Apprendi* and *Blakely* are irrelevant if the jury's verdict authorizes life imprisonment. See *United States* v. *Smith*, 223 F.3d 554 (7th Cir. 2000).

Think of the indeterminate sentence: zero-to-life with release in the discretion of parole officials. The federal Parole Commission eventually developed a set of release guidelines designed to ensure consistent treatment of offenders. See *United States* v.

Addonizio, 442 U.S. 178, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979). Parole-release guidelines might say something like: "Hold bank robbers in prison for 10 years; hold armed bank robbers for 20; hold armed bank robbers who discharge their weapons or take hostages for 30; add (or subtract) time from these presumptive numbers to reflect the size of the heist." If my colleagues are right, then such a system violates the sixth amendment. Yet the Justices do not think this a problem, as parole and other forms of executive clemency don't affect the degree of the offense and therefore do not undercut the jury's role. See *Blakely*, slip op. 13. If parole regulations are valid, why not the federal Sentencing Guidelines? How could commissioners, but not judges, be free to apply regulations that depend on how much cocaine the defendant distributed, or whether he pulled a gun on the teller? Once the jury has determined the degree (and the statutory consequences) of the offense, both judges and executive officials constitutionally may take part in determining how much of the statutory maximum the defendant serves in prison.

One other point about the federal sentencing guidelines: Given the matrix-like nature of the system and the possibility of departure, see 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0; *Koon* v. *United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996), the only finding that is *indispensable* to Booker's sentence is the one specified by statute: did he distribute more than 50 grams of cocaine base? The jury found beyond a reasonable doubt that he had. Where in the resulting statutory range of 10 years to life the actual sentence falls depends on complex interactions among drug quantity, gun use, violence, role in the offense (was defendant the mastermind or just a courier?), coopera-

tion, obstruction of justice, criminal history, and other factors, none of which is a sine qua non in the same sense as the statutory thresholds. See U.S.S.G. § 2D1.1 (21 pages long and just a starting point; later chapters provide many adjustments). No answer to the question "what was the total quantity?" gives any defendant a legal entitlement to a particular sentence. Lower quantities of drugs can be counterbalanced by a longer criminal history or a more senior role in the offense, or the judge may decide that upward departure is appropriate. Even if *Blakely*'s definition reaches regulations adopted by a body such as the Sentencing Commission, it requires an extra step (or three) to say that the jury must make the dozens of findings that matter to the Guidelines' operation in each case.

Apprendi and *Blakely* hold that the sixth amendment commits to juries all statutory sentencing thresholds. Perhaps the Court eventually will hold that some or all of the additional determinations that affect sentences under the federal Sentencing Guidelines also are the province of jurors. But *Blakely* does not take that step, nor does its intellectual framework support it—and *Edwards* holds that the current structure is valid provided that juries make all decisions that jack the maximum sentences. I would treat *Blakely* as holding that, when there are multiple statutory caps, the "statutory maximum" is the lowest one and the jury must determine whether statutory thresholds to increased ranges have been satisfied. To read more into *Blakely* is to attribute to that opinion something beyond its holding, and to overthrow the real holdings of other decisions.

Today's decision will discombobulate the whole criminal-law docket. I trust that our superiors will have something to say about this. Soon.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 03-4225

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FREDDIE J. BOOKER, DEFENDANT-APPELLANT

July 13, 2004

Appeal from the United States District Court for the
Western District of Wisconsin

ORDER

Before: HON. RICHARD A. POSNER, Circuit Judge; FRANK H. EASTERBROOK, Circuit Judge; HON. MICHAEL S. KANNE, Circuit Judge.

The Opinion issued July 9 is amended by adding the following sentence as a new, final paragraph of the opinion (just before "Reversed and Remand):

Because the government does not argue that Booker's Sixth Amendment challenge to the guidelines was forfeited by not being made in the district court,

we need not consider the application of the doctrine of plain error, e.g., *United States v. Olano*, 507 U.S. 725, 731 (1993), to challenges inspired by the Blakely decision.

APPENDIX C

UNITED STATES v. BOOKER

ORAL ARGUMENT, JULY 6, 2004

UNOFFICIALLY TRANSCRIBED FROM AUDIO RECORDING

This excerpt begins at approximately 19:41 into the argument, about midway through the government's argument:

MS. OLSON: If I could just quickly proceed to the government's second point. We believe that until the Supreme Court says otherwise, Blakely does not apply to the federal Guidelines. But we do want to say that in the event that lower courts disagree with that position, and hold that sentencing under the federal guidelines must comport with Blakely's procedural requirements, then the question is whether that's possible. And in some cases it will be

Q: Whether it's what?

MS. OLSON: Whether it's possible to sentence someone under the federal guidelines in a way that comports with Blakely. And in some cases that will be possible where, for example, the sentencing judge determines that there are no applicable guidelines provisions that would call for enhancements based on facts beyond those either admitted by the defendant or established in the jury verdict. And there are other cases, if the defendant waives

his right to be sentenced under Blakely or if on appeal any Blakely error doesn't

Q: What if the whole federal sentencing guidelines scheme [inaudible]

MS. OLSON: And that's the third possibility, your honor. That's the government's third point. If this court holds, or if any circuit court or district court concludes that sentencing under the federal guidelines must comport with Blakely, but the sentencing judge finds that there are in fact applicable sentencing provisions, guidelines provisions that would call for enhancements based on facts beyond those either established in the jury verdict or admitted by the defendant, then the government's position is that the guidelines as a whole may not be constitutionally applied. We believe that any attempt to overlay

Q: But really the judge could always treat the guidelines as recommendations, couldn't he? even if they were unconstitu . . . I mean the guidelines aren't going to be held unconstitutional. The question is whether the guidelines can require judges to impose sentences in particular cases.

MS. OLSON: Exactly, your honor. And in fact even if the guidelines as a whole cannot constitutionally be applied the result, we believe, would be that the judge would exercise traditional judicial discretion to impose a sentence, and in that case it would be the government's position in every case to urge the sentencing judge to draw from the guidelines, and to impose a sentence that would

comport with the sentence available under the guidelines.

Q: You wouldn't go back to the system as before the guidelines were implemented. That is, where the judge had virtual total discretion within the statutory maximum.

MS. OLSON: If the guidelines cannot constitutionally be applied, then we would . . . then the judge's discretion would be pre-guidelines discretion. But we believe that the sentencing commission over almost twenty years now of modification and tinkering and experimentation has in fact come up with a very valuable method of taking the factors that judges have traditionally used in sentencing, and determining how those should properly be weighed so that the result is in fact a sentence that is fair and appropriate

* * * * *

REBUTTAL ARGUMENT OF APPELLANT'S COUNSEL KELLY:

MR. KELLY: It's our position that Blakely doesn't require the sentencing guidelines to be found unconstitutional in their entirety. It merely requires that any fact which needs to be found in order to increase a sentence needs to be found by a jury or admitted by the defendant during his plea. [inaudible]

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 03-CR-026-S

UNITED STATES OF AMERICA

v.

FREDDIE J. BOOKER, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

On or about February 26, 2003, in the Western District of Wisconsin, the defendant,

FREDDIE JOE BOOKER,

knowingly and intentionally possessed with intent to distribute more than 50 grams of a mixture or substance containing cocaine base, a Schedule II controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

COUNT 2

On or about February 26, 2003, in the Western District of Wisconsin, the defendant,

FREDDIE JOE BOOKER,

knowingly and intentionally distributed a mixture or substance containing cocaine base, a Schedule II controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

A TRUE BILL

/s/ Signature illegible
PRESIDING JUROR

/s/ Signature illegible
J.B. Van Hollen
United States Attorney

Indictment returned: March 12, 2003

APPENDIX E

STATUTORY APPENDIX

1. The Due Process Clause of the United States Constitution, Amendment V, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

3. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

> **(a) Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sen-

tence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assis-

tance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * * *

4. Section 3742 of Title 18 United States Code, titled "Review of a sentence," provides as follows:

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

5. Section 841(a) and (b) of Title 21 of the United States Code, titled "Prohibited Acts A," provides, in relevant part, as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment

which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * * *

6. Section 991 of Title 28 of the United States Code, titled "United States Sentencing Commission; establishment and purposes," provides, in relevant part, as follows:

* * * * *

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

* * * * *

7. Section 994 of Title 28 of the United States Code, titled "Duties of the Commission," provides, in relevant part, as follows:

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

* * * * *

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not

exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

8. United States Sentencing Guidelines § 1B1.1, titled "Application Instructions," provides, in relevant part, as follows:

Except as specifically directed, the provisions of this manual are to be applied in the following order:

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four.

Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

* * * * *

9. United States Sentencing Guidelines § 1B1.3, titled "Relevant Conduct (Factors that Determine Guideline Range)," provides, in relevant part, as follows:

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

* * * * *

10. United States Sentencing Guidelines § 2D1.1, titled "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy," provides, in relevant part, as follows:

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to (I) human life other than a life described in subdivision (C); or (II) the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(6) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

* * * * *

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(1) •30 KG or more of Heroin (or the equivalent amount of other Schedule I or II Opiates); •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •1.5 KG or more of Cocaine Base;	Level 38
* * * * *	
(2) •At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 36

	•At least 500 G but less than 1.5 KG of Cocaine Base;	
	* * * * *	
(3)	•At least 3 KG but less than 10 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 150 G but less than 500 G of Cocaine Base;	Level 34
	* * * * *	
(4)	•At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 50 G but less than 150 G of Cocaine Base;	Level 32
	* * * * *	
(5)	•At least 700 G but less than 1 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 35 G but less than 50 G of Cocaine Base;	Level 30

* * * * *

(6)	•At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 20 G but less than 35 G of Cocaine Base;	Level 28

* * * * *

(7)	•At least 100 G but less than 400 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 5 G but less than 20 G of Cocaine Base;	Level 26

* * * * *

(8)	•At least 80 G but less than 100 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 400 G but less than 500 G of Cocaine (or the equivalent a mount of other Schedule I or II Stimulants); •At least 4 G but less than 5 G of Cocaine Base;	Level 24

* * * * *

(9)	•At least 60 G but less than 80 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 3 G but less than 4 G of Cocaine Base;	Level 22

* * * * *

(10)	•At least 40 G but less than 60 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 200 G but less 300 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 2 G but less than 3 G of Cocaine Base;	Level 20

* * * * *

(11)	•At least 20 G but less than 40 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 1 G but less than 2 G of Cocaine Base;	Level 18

* * * * *

(12)	•At least 10 G but less than 20 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •At least 500 MG but less than 1 G of Cocaine Base;	Level 16

* * * * *

(13)	•At least 5 G but less than 10 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 14

•At least 250 MG but less than 500 MG of Cocaine Base;

* * * * *

(14)	•Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); •Less than 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants); •Less than 250 MG of Cocaine Base;	Level 12

* * * * *

* Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

* * * * *

(F) In the case of Schedule I or II Depressants, Schedule III substances (except anabolic steroids),

Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance is in liquid form, one "unit" means 0.5 gm.

* * * * *

11. United States Sentencing Guidelines § 3B1.1 titled "Aggravating Role," provides, in relevant part, as follows:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

* * * * *

12. United States Sentencing Guidelines § 3C1.1 titled "Obstructing or Impeding the Administration of Justice," provides, in relevant part, as follows:

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the

instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * * * *

13. United States Sentencing Guidelines § 6A1.3 titled "Resolution of Disputed Factors (Policy Statement," provides as follows:

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521(10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings

of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols , 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991; United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.),

cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered where there is good cause for the nondisclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.